IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARISOL VILCHIS, Appellant.	No. 33078-4-II UNPUBLISHED OPINION

ARMSTRONG, J. -- Marisol Vilchis appeals her conviction for first degree assault with a deadly weapon sentencing enhancement. She argues that the State presented insufficient evidence to prove (1) that she knew the victim was a police officer when she stabbed him, and (2) that the knife she used was a deadly weapon. She also contends that sentencing her for the assault and the weapon enhancement constitutes double jeopardy. Finding no error, we affirm.

FACTS

Pierce County Deputy Sheriff Gavin Foster responded to domestic disturbance calls at Marisol Vilchis's residence three times on the night of the assault. The first time, Vilchis answered the door and asked Foster if he was a police officer. Foster, who was wearing his patrol uniform, said he was. Foster left without entering the residence. He returned later in the night, but no one answered the door.

On his third visit, Foster found the front door ajar and knocked on it. Vilchis came to the door and said, "[Y]ou again; you aren't a real cop." Report of Proceedings (RP) at 126. She slammed the door, and Foster heard another woman yelling, "What are you doing? He is a real cop. Open the door." RP at 127. Foster heard the women screaming and arguing about whether

he was a police officer. Then he heard sounds of a scuffle and finally someone yelling, "Help me. Kick the door in. Help me." RP at 127. Foster kicked the door in and saw Vilchis and Monalisa Cabrera grappling with each other.

When Foster told the women to stop fighting, they complied, and Vilchis started walking into a hallway. Foster ordered her to stop and, when she continued walking, he grabbed her from behind and attempted to apply a lateral vascular neck restraint, which would have temporarily cut off her oxygen supply, allowing the officer to subdue her. As they struggled, Vilchis was swinging her fist at him backward over her shoulder. Foster thought she was hitting him only with her fist, but when he looked at her hand, he saw she had a knife. He estimated the length of the knife's blade at four to four-and-a-half inches. Although Vilchis struck Foster in the chest, the knife left no apparent marks on his uniform or Kevlar vest. It did, however, cut his arm.

Foster kicked and pushed Vilchis away and drew his firearm. He ordered her to drop the knife, and she threw it in his direction and began pleading with Foster not to kill her. When she ignored his commands to get on the floor, Foster fired his taser at her and eventually took her into custody. As he took her to the patrol car, she begged an onlooker to go with her in the car because, she said, Foster was not a real police officer.

The State charged Vilchis with first degree assault. At trial, the defense called Dr. Brett Trowbridge, a forensic psychologist who testified that he had diagnosed Vilchis with schizo-affective disorder. He cited past diagnoses of the same disorder when Vilchis was in the navy a few years prior. He also reported that Vilchis had not been taking her prescribed medication for the disorder at the time of the assault. He concluded that, on the night in question, "her ability to form the opinion to accomplish a result which constitutes a crime was substantially diminished."

RP at 186-87.

In rebuttal, the State called Dr. Thomas LeCompte, a staff psychologist at Western State Hospital, who questioned whether Vilchis had met the diagnostic criteria for schizo-affective disorder, either in the navy or on the night of the assault. LeCompte discussed examples of Vilchis's behavior near the time of the assault that showed the capacity to form intent. He also reported that, during his examination of her, Vilchis said that she had intended to stab Foster.

The jury convicted Vilchis of first degree assault and also found that the knife she swung at Foster was a deadly weapon. Vilchis moved for a new trial on the grounds that the verdict was contrary to law and evidence, that substantial justice had not been done, and that the sentencing enhancement constituted double jeopardy. The trial court denied the motion and sentenced Vilchis to the statutory minimum 60 months confinement on the assault conviction, plus a 24-month sentencing enhancement.

ANALYSIS

I. Sufficiency of the Evidence

We review a challenge to the sufficiency of the evidence by asking whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citations omitted). The State bears the burden of proving each element of the crime beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). A defendant commits first degree assault if, "with intent to inflict great bodily harm," he assaults the victim "with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1)(a). The State proves intent when the defendant "acts with the objective or purpose to

accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). Because self-defense is a lawful act, "it negates the element of 'unlawfulness' contained within Washington's statutory definition of criminal intent." *McCullum*, 98 Wn.2d at 495.

Vilchis argues that the State failed to prove that she acted with the statutorily required criminal intent. Specifically, Vilchis contends that she had the right to defend herself against Foster's use of force unless the State proved that she knew he was a police officer. And she reminds us that she repeatedly said that Foster was not a "real cop." Br. of Appellant at 12. In a related argument, Vilchis reasons that her mental illness rendered her incapable of perceiving that Foster was a police officer, a proposition the State failed to disprove according to Vilchis.

Vilchis is correct that the scope of her self-defense rights is determined by who her victim was. Generally, to justify the use of force, a defendant must believe in good faith that the use of force was necessary. *State v. Bradley*, 96 Wn. App. 678, 683, 980 P.2d 235 (1999) (citing *State v. Janes*, 121 Wn.2d 220, 240, 850 P.2d 495 (1993)). But where the victim is a law enforcement officer exercising his official duties, the defendant must show that she was in actual, imminent danger, a reasonable but mistaken belief is insufficient justification. *Bradley*, 96 Wn. App. at 683 (citing *State v. Valentine*, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997)). "'Orderly and safe law enforcement demands that an arrestee not resist a lawful arrest . . . unless the arrestee is actually about to be seriously injured or killed.'" *Valentine*, 132 Wn.2d at 20 (quoting *State v. Westlund*, 13 Wn. App. 460, 467, 536 P.2d 20 (1975)). Vilchis presented no evidence that she was in actual danger of serious injury or death when she first struck at Foster. Thus, the only issue is whether the State proved that she knew or should have known that Foster was a police officer engaged in his official duties at the time. *See State v. Filbeck*, 89 Wn. App. 113, 116-17, 952 P.2d 189

(1997).

A. Self-Defense

When Foster knocked on the door of Vilchis's residence, Vilchis told him that he was not a police officer. After she closed the door, he could hear her arguing with Cabrera about whether he was a police officer. As Foster was taking Vilchis to his patrol car, she insisted to bystanders that he was not a police officer. In addition, Kevin, a security guard, lives in the same apartment complex, and Vilchis may have thought Foster was Kevin. Vilchis claims that because the State failed to dispute this evidence, it failed to rebut her self-defense claim. We disagree.

The State presented sufficient evidence for the jury to find that Vilchis knew or should have known that Foster was a police officer. On Foster's first visit to the residence, Vilchis asked him if he was a police officer and he replied that he was. He was driving a marked patrol car and was wearing his uniform, with sheriff's department patches on the sleeves, a star on the chest, the sheriff's department emblem on the back, and a hat displaying the words "Pierce County." RP at 116. He was also wearing a Kevlar vest and carrying a baton and his duty weapon on his hip. In addition, Vilchis and Cabrera were arguing about whether Foster was a police officer with Cabrera insisting that he was. Viewed in the light most favorable to the State, this evidence was sufficient for a rational jury to find that Vilchis knew or should have known that Foster was a police officer.

B. Vilchis's Mental Illness

Vilchis points to Trowbridge's testimony that "Ms. Vilchis' mental illness both prevented her from accurately perceiving that Deputy Foster was a police officer and substantially diminished Ms. Vilchis' ability to form the legal intent to commit assault." Br. of Appellant at 13. Vilchis claims that the State's evidence was insufficient to rebut Trowbridge's testimony because the rebuttal witness, LeCompte, used an

incorrect definition of intent in his analysis. Again, we disagree.

First, contrary to Vilchis's assertion, the State did rebut Trowbridge's testimony. Vilchis's claim that LeCompte's "definition of intent was limited to 'goal-oriented' activity," is a mischaracterization of the evidence. Br. of Appellant at 13. LeCompte offered this definition when defense counsel asked him "[w]hat does 'intent' mean to you?" RP at 274. LeCompte replied that, without looking at the statutory definition, he considered intent to be the "capacity to engage in purposeful and goal-directed activity." RP at 275. But he clarified that when he conducted his evaluation of Vilchis, he used the statutory definition as the basis for his opinion.

Second, Vilchis overstates Trowbridge's certainty about her lack of ability to act with the necessary intent. On cross-examination, Trowbridge stated, "I said that it possibly substantially diminished her capacity. I'm not saying that she absolutely couldn't have." RP at 205. Later he repeated, "[I]t possibly affected her ability to form the intent to accomplish a result which constitutes a crime." RP at 206.

Moreover, this argument assumes that the State had to prove that Vilchis assaulted Foster actually knowing he was a police officer. It did not. The State had to prove that Vilchis intentionally struck at Foster. The conduct itself amply demonstrated that Vilchis intended to stab Foster. And Vilchis admitted to LeCompte that she intended to hit Foster. In addition, the State had to prove that at the time of the assault, Vilchis knew or should have known that Foster was a police officer performing his official duties. As we have discussed, the State offered ample evidence of constructive knowledge.

We conclude that the State presented sufficient evidence to prove that Vilchis knowingly assaulted a police officer.

II. Deadly Weapon Enhancement

As an alternative to reversing the conviction, Vilchis asks that the case be remanded for sentencing without the enhancement for use of a deadly weapon. She argues that the State failed to prove that the knife blade was longer than three inches or that the knife, as she used it, was likely to produce or could have easily produced death. Thus, she reasons that the evidence was insufficient to support the special verdict finding of a deadly weapon.

A knife may qualify as a deadly weapon in two ways. A knife is a deadly weapon per se if its blade is longer than three inches. RCW 9.94A.602. If the blade is not longer than three inches, it still may fit the statute's description of a "dirk" or a "dagger" if it "has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death." RCW 9.94A.602; *see also State v. Zumwalt*, 79 Wn. App. 124, 129-30, 901 P.2d 319 (1995), *overruled in part by State v. Bisson*, 156 Wn.2d 507, 520, 130 P.3d 820 (2006); *State v. Myles*, 75 Wn. App. 643, 645, 879 P.2d 968 (1994), *rev'd on other grounds*, 127 Wn.2d 807 (1995). Relevant to a court's consideration of the knife's inherent capacity and the manner in which it has been used "are the defendant's intent and present ability, the degree of force used, the part of the body to which the weapon was applied and the injuries inflicted." *Zumwalt*, 79 Wn. App. at 130 (citing *State v. Thompson*, 88 Wn.2d 546, 548-49, 564 P.2d 323 (1977)). This determination is a question of fact for the jury. *See Zumwalt*, 79 Wn. App. at 131.

We need not consider whether the evidence was sufficient to prove that the knife was a deadly weapon as Vilchis used it because the State introduced uncontroverted evidence that the knife was a deadly weapon per se. Foster estimated the blade length at four to four-and-a-half inches. A photograph of the knife and the knife itself were admitted into evidence, allowing the jury to make its own factual determination as to

length. The defense presented no evidence to the contrary. Accordingly, we affirm the special verdict.

III. Double Jeopardy

Vilchis argues, finally, that her sentencing enhancement should be vacated because it violates double jeopardy principles as guaranteed by the Fifth Amendment to the U.S. Constitution and article 1, section 9 of the Washington Constitution. While acknowledging that past double jeopardy challenges to Washington's Hard Time for Armed Crime legislation have not been successful, she argues we should overrule prior cases insofar as they allow deadly weapon enhancements for crimes that cannot be committed without use of a deadly weapon.

The double jeopardy clause "'protects against multiple punishments for the same offense.'" *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969)); *State v. Harris*, 102 Wn.2d 148, 158, 685 P.2d 584 (1984), *overruled in part by State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991) *and State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). Washington's guaranty against double jeopardy has traditionally received the same interpretation as the federal double jeopardy clause. *Harris*, 102 Wn.2d at 160-61. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Hunter*, 459 U.S. at 366. Where the legislature intended to impose multiple punishments, imposing such sentences does not violate the Constitution. *Hunter*, 459 U.S. at 368 (quoting *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)). The Washington courts do not consider sentencing enhancements to create additional criminal offenses. *See Harris*, 102

Wn.2d at 159-60; *State v. Claborn*, 95 Wn.2d 629, 637, 628 P.2d 467 (1981). The courts have repeatedly upheld deadly weapon enhancements even when being armed with a deadly weapon is an element of the offense. *See*, *e.g.*, *State v. Huested*, 118 Wn. App. 92, 95, 74 P.3d 672 (2003), *review denied*, 151 Wn.2d 1014 (2004); *State v. Caldwell*, 47 Wn. App. 317, 319-20, 734 P.2d 542 (1987) (citing *State v. Pentland*, 43 Wn. App. 808, 811-12, 719 P.2d 605 (1986)). Vilchis must take her argument for overruling this precedent to the Supreme Court.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Quinn-Brintnall, C.J.

Penoyar, J.